REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

CRIMINAL APPEAL NO. 5 OF 2020

EMMANUEL KIPKORIR LANGAT..... APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(From Original Conviction and Sentence of Hon. K.Kibelion in the Senior Resident Magistrate's

Court at Bomet, in Criminal Case S.O. Number. 1079 of 2019 dated 24th September 2020)

JUDGMENT

1. The Appellant was charged before the Principal Magistrate Court in Bomet with the offence of Attempted murder contrary to Section 220 (a) of the Penal Code. The particulars of the offence were that on the 28th day of April 2019 at around 1400hrs at Kipsilubwet village in Chemaner location within Bomet county, attempted to unlawfully cause the death of Geoffrey Kibet Maritim by cutting him on the head using a panga.

2. The Appellant initially pleaded guilty but laterf changed his plea and the case went into full trial in which the prosecution called six witnesses. At the close of the prosecution's case, the trial court found that the Appellant had a case to answer. Section 211 was explained to him in Kipsigis language and he elected to adduce unsworn evidence with no witnesses. At the close of the defence case, the court found the Appellant guilty and was accordingly convicted and upon mitigation, the Appellant was sentenced to 20 years imprisonment.

3. The Appellant filed an Appeal in which he outlined 10 grounds as follows:

1) That he pleaded not guilty at the trial.

2) That the learned trial magistrate erred both in law and fact by failing to analyse and evaluate the entire evidence.

3) That the learned trial magistrate erred in both law and fact by relying on uncorroborated evidence in that, the panga in question was not well known whose (sic).

4) That the learned trial magistrate erred in both law and fact by relying on shoddy investigation where the investigating officer failed to establish that both the appellant and the witnesses were employees.

5) That the learned trial magistrate erred in both law and in fact by rejecting his palusible evidence without further explanation.

4. The Appellant later filed an amended Memorandum of Appeal which was filed on 18th October 2020. He outlined the following grounds:

(1) That the charge sheet was defective within the meaning of section 214 of the Criminal Procedure Code, the evidence tendered at the trial was equally at variance with the particulars stated and no OB number.

(2) That the learned trial magistrate erred in law and in fact notwithstanding the contradictions and uncorroborative of the witnesses.

(3) That the constitutional rights of the appellant were prejudiced given on Article 49(f) (i), (ii), Appellant arrested on 29th day of April 2019 and arraigned in court on 2nd day of May 2019, a period of three days in contempt of the above article.

5. The Appeal was disposed of by way of written submissions.

The Appellant's Case

6. The Appellant testified that he was a tea plucker and on the material day, he was on his way to get sugar from a shop when he was called by PW1, the victim and PW2 who went to get tea. While he took his tea, PW1 continued digging holes for the tea planting and then demanded Kshs. 350/= which was owing to him by the Appellant. It was his testimony that PW1 threatened to kill him by lifting the panga. He then lifted his hands in a bid to protect himself from the attack and in the process a struggle ensued. PW1 at that point fell on the panga thereby cutting himself. He testified that there were no witnesses present and that those who testified in court arrived after the incident. He also stated that he had no disagreement with the victim.

The Respondent's Case

7. The Prosecution witnesses PW1, PW2, PW4 and PW5 testified that on the material day, they were all together with the Appellant at the farm of PW5 Leonard Kipkoech Mutai planting tea. At around 2.00 p.m. they took a break to take tea and it was at that time that the Appellant took a panga and cut PW1 from behind then fled the scene. It was their testimony that the Appellant was later apprehended and that the victim was treated at Longisa County Hospital, Tenwek Hospital and later at the Moi Teaching and Referral Hospital. The Clinical Officer (PW3) who examined the victim after the incident described the injuries while the investigating Officer PW3 and PW6 testified that members of the public arrested and presented the accused at the police station on 30/4/2019.

The Appellants' Submissions

8. The Appellant, in his homemade submissions argued on three grounds. Firstly, that the charge sheet was incurably and fatally defective on the face of it as no OB number was indicated and the date referred to therein was indicated as 28th April 2019 yet the witnesses testified that the incident occurred on 27th April 2019. He submitted that section 382 of the Criminal Procedure Code could not cure such an error since even the victim himself testified that the incident occurred on 24th April 2019. That it was the Prosecution's (Respondent) duty to amend the same under section 214 of the Criminal Procedure Code but failed to do so. It was his submission that such an error and omission went to the root of the trial and the subsequent conviction was irregular and ought not to be allowed to stand since the trial court ought to have considered the defect in his favour.

9. Secondly, the Appellant submitted that the evidence adduced by the witnesses being PW1 and PW5 was inconsistent in respect of the date when the offence was committed, whether there was a dispute between PW1 and the Appellant and the number of people in the said farm at the time of the incident. That the said inconsistencies ought to be considered in his favour.

10. Lastly, the Appellant submitted that his constitutional right to be arraigned before court in accordance with Articles 159 and 49 (f) of the Constitution were violated when he was charged in court three days after his arrest. He argued that the duty to provide justification for any delays lay on the prosecution. That this duty was paramount regardless of the fact that there could have been overwhelming evidence against an accused person. To this end, he cited the case of *Paul Mwangi Murunga vs. Republic, Criminal Appeal No. 35 of 2006 (ur)* and *Albanus Mutua Muhia vs. Republic, Criminal Appeal No. NBI 120 of 2014*. He urged the Court to

allow the appeal, quash the conviction and set aside the sentence.

The Respondent's Submissions

11. The Respondent submitted on three issues. Firstly, on whether the charge sheet was defective, they submitted that not all defects on a charge would render a conviction invalid. That the test for determining this was aptly established by the Supreme Court of India in *Willie (William) Slaney vs. State of Madhya Pradesh (A.I.R. 1956, Madras Weekly Notes, 391)* where the court has to consider whether such an irregularity occassioned prejudice to an accused person or was a mere insubstantial technicality. In cementing this position, the Respondent further cited Article 159 (2) (d) of the Constitution to the extent that the Court was bound to administer justice without much regard to technicalities. That the main consideration for the Court was whether the defect prejudiced the accused person (Appellant herein) to an extent of making him unaware or confused as to the charges he was facing such that he would be unable to put up an appropriate defense. It was their submission that the Appellant ought to have raised this issue during the defence hearing and that the said defect cannot dilute the evidence presented in respect of the charge since he was able to understand the nature of charges against him and adequately cross-examined the witnesses during the trial.

12. Secondly on the issue of inconsistent evidence, the Respondent submitted that the difference in dates as testified by PW1 from the other witnesses could not impeach the credibility of the witnesses. To this end, they cited the case of ***Philip Nzaka Watu vs. R (2016) eKLR.***

13. Lastly, on the issue of violation of Article 49 (f) (i) and (ii), the Respondent submitted that the Court should appreciate the fact that some offences which may be considered serious in nature may call for more time for thorough investigation before a person is arrested and arraigned before court and at the same time, may require that such a person be apprehended to prevent them from disappearing or interfering with the witnesses. It was their submission that the Appellant had committed a serious crime, escaped from the scene of the crime, and now that he had been found, it was necessary for the police to arrest him as there was a further risk of flight.

14. The Respondent urged the Court to uphold the conviction and the sentence meted by the trial magistrate.

Issues for Determination

15. Having reviewed the trial Record, the grounds of appeal and the respective submissions from the parties, the two main issues for determination are as follows:-

i. Whether the the conviction was lawful and safe.

ii. Whether the sentence was appropriate.

(i) Whether the conviction was lawful and safe

16. In the case of **Gabriel Kamau Njoroge vs. Republic, Criminal Appeal No.149 of 1986 [1987] eKLR** Court of Appeal in Nairobi, Platt & Apaloo, JA.A. and Masime Ag. J.A reiterated the duty of a first appellate court as follows:-

"As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of fact as on questions of law, to demand a decision of the court."

(See also **Peters vs. Sunday Post Ltd [1958] EA 424***)*.

17. The Appellant in this case was charged with the offence of attempted murder contrary to section **Section 220 (a)** of the Penal Code. The said section provides as follows,

"Section 220 -Attempt to murder

Any person who—

(a) attempts unlawfully to cause the death of another; or

(b) with intent unlawfully to cause the death of another does any act, or omits to do any act which it is his duty to do, such act or omission being of such a nature as to be likely to endanger human life, is guilty of a felony and is liable to imprisonment for life."

18. I also make reference to **section 388 of the Penal Code** which states as follows:-

(1) When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfillment, and manifests his intention by some overt act, but does not fulfill his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.

(2) It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfillment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.

(3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence.

19. From the above legal provisions, the main ingredient of an attempted offence is the intention to commit the said offence, whether or not the same is actually carried out to fruition or not. This intention is what constitutes the criminal intent or *mens rea* of the offence while the actual execution of any act in an attempt to commit the crime is the *actus reus*. Thus, in the present case, the main ingredients for attempted murder would be the intention to cause the death of another and the actus reus would be the actual act that would likely to lead to the death, but which subsequently fails.

20. Lord Goddard C.J. in **R. vs. Whybrow (1951) 35** (**1951) 35 CR APP REP, 141,** stated as follows on *mens rea* in respect of the offence of attempted murder:-

"..... But if the charge is one of attempted murder, the intent becomes the principal ingredient of the crime."

21. *Mens rea* in attempted murder was also explained in **Criminal Law, Butterworths (1998) 6th Edition at page 288** that, *"Nothing less than an intention to kill will do."*

22. It follows then that the acts of an accused person must be considered and determined as to whether they were intended for the death of a victim and a determination must be made on whether there was an intention to commit the act, which will all be a question of fact. The Court of Appeal explained this principle adequately in **Abdi Ali Bare vs. Republic (2015) eKLR**. Githinji, Mwilu J and M'Inoti JJA stated thus:-

".....The more challenging question in a charge of attempted murder is the actus reus of the offence. Although a casual reading of Section 388 of the Penal Code may suggest that an attempt is committed immediately the accused person commits an overt act towards the execution of his intention, it has long been accepted that in a charge of attempting to commit an offence, a distinction must be drawn between mere preparation to commit the offence and attempting to commit the offence. In the work quoted above by Smith & Hogan (Butterworths), the authors give the following scenario at page 291 to illustrate the distinction:

'D, intending to commit murder buys a gun and ammunition, does target practice, studies the habits of his intended victim, reconnoiters a suitable place to lie in ambush, puts on a disguise and sets out to take up his position. These are all acts of preparation but could scarcely be described as attempted murder. D takes up his position, loads the gun, sees his victim approaching, raises the gun, takes aim, puts his finger on the trigger and squeezes it. He has now certainly committed attempted murder...'

In the present appeal, to prove attempted murder on the part of the appellant, he must be proved to have taken a step towards the commission of murder, which step is immediately and not remotely connected with commission of the murder. Whether there has

been an attempt to commit an offence is a question of fact. The act alleged to constitute attempted murder, for example, must be sufficiently proximate to murder to be properly described as attempt to commit murder. In CROSS & JOINES' INTRODUCTION TO CRIMINAL LAW, Butterworths, 8th Edition (1976), P. Asterley Jones and R. I. E. Card state as follows at page 354:

'..[A]n act is sufficiently proximate when the accused has done the last act which it is necessary for him to do in order to commit the specific offence attempted...'

The learned authors add that the court must answer the question whether the acts by the accused person were immediately or merely remotely connected with the commission of the specific offence attempted on the basis of common sense. Ultimately therefore, the real question is whether the acts by the accused person amounted to mere preparation to commit murder or whether the accused had done more than mere preparatory acts."

23. In the present Appeal, four of the prosecution witnesses testified that the Appellant picked up a panga and cut the victim on his head from the back. Their evidence was and remained consistent throughout the trial. Further, PW3, Julius Magwi who was a clinical officer examined the victim on 14th May 2019 after he was discharged from hospital at Moi Teaching and Referral Hospital (MTRH). It was his testimony that the victim had a history of being assaulted and had sustained serious head injuries with a linear scar at the back of his head and a depressed skull fracture of the occipital region. The estimated date of the injury was 17 days. He also testified that the injuries were occassioned by a sharp object. This was also indicated on the P3 Form which was produced as PEX-3. This medical evidence corroborates the testimony of the victim that he was cut by a sharp object and that of PW2, PW4 and PW5 that the victim was cut by a panga on the back of his head.

24. The victim in this case (PW1) testified that he never saw who cut him, but was informed that the Appellant cut him and he fell down unconscious. However, PW2, Geoffrey Kipkemoi Korir who was present on the material day alongside PW4 and PW5 all testified that while they were all together in the farm taking tea, the Appellant picked the panga and cut the victim on his head from behind. PW2 also confirmed that the panga that was used belonged to him. He positively identified it before the trial court and the same was marked as PMFI and later produced by the investigating officer PW6 as PEX4.

25. From the above facts, it can safely be concluded that the action by the Appellant to pick a panga and cut PW1 across the back of his head amounted to an attempt to take the victim's life. This is my view was not mere assault by a dangerous weapon, it entailed a conscious decision to aim the panga at the victims head, more particularly at the back. If the result of such an act was not meant to cause fatal harm, one can only wonder what other intention the Appellant would have had in doing so. He also made the situation worse when he fled the scene and was only arrested days later. His condut demonstrated a guilty mind, the requisite *mens rea* as elucidated above.

26. It is my finding therefore that , both the *mens rea* and the *actus reus* in respect of the offence of attempted murder were present in the actions of the Appellant and this was adequately proven. It is my further finding that there was no possibility of mistaken identity as the Appellant, the victim, PW2, PW4 and PW5 were all known to each other as they worked together.

27. The Appellant contended that the charge sheet was defective.

Section 134 of the Criminal Procedure Code outlines the manner in which a charge shall be fashioned which is:

"134. Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged." Underlining mine for emphasis.

28. A defective charge entails a charge that is not disclosed by the evidence on record. This was properly explained by the Court of Appeal in the case of **Yongo vs. Republic [1983] KLR, 319** as follows:-

"In our opinion a charge is defective under Section 214(1) of the Criminal Procedure Code where:

(a) it does not accord with the evidence in committal proceedings because of inaccuracies or deficiencies in the charge or because it charges offences in the charge not disclosed in such evidence or fails to charge an offence which the evidence in the committal

proceedings discloses; or

(b) it does not, for such reasons, accord with the evidence given at the trial; or

(c) it gives a misdescription of the alleged offence in its particulars."

29. In **Sigilani vs. Republic [2004] 2 KLR,** Kimaru J. stated that:-

"...the principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable an accused person to prepare his defence."

(See also Court of Appeal decision in **Yosefa v. Uganda [1969] E.A. 236**).

30. I have perused the Record and noted that the defect referred to by the Appellant is in respect of the date of commission of the offence. The Charge sheet recorded the date of the offence as 28th April 2019 while the Respondent's witnesses testified that the incident occurred on 27th April 2019. The test for determining whether a charge is defective is a substantive one and not a formalistic one. The ultimate test by this Court is whether such a defect occassioned a miscarriage of justice to the Appellant.

31. In the case of **JMA vs. Republic (2009) KLR 671**, it was held *inter alia* that:-

"It was not in all cases in which a defect detected in the charge on appeal would render a conviction invalid. Section 382 of the Criminal Procedure Code was meant to cure such an irregularity where prejudice to the appellant is not discernible."

32. I have considered the arguments from both sides and I agree with the Respondent that this particular discrepancy did not occassion any prejudice to the Appellant. In fact, it is clear that throughout the proceedings, he was able to comprehend with clarity the charges he was facing and was knowledgeable about the events that led to the offence in question. It was no wonder the Appellant could adequately cross examine the Respondent's witnesses and further put up his own defence to explain to the trial court his own side of the story.

33. Indeed, the Court of Appeal in **Obedi Kilonzo Kevevo vs. Republic [2015]** made reference to **section 382 Criminal Procedure Code** as an avenue for curing such defects. Section 382 provides as follows:-

"382. Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

34. The Court of Appeal also went on to explain that this curative position was also reiterated in **Section 214 (2)** of the Code. This section states as follows:-

"214…variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof."

35. It is my finding therefore that there was no miscarriage of justice against the Appellant as a result of the errors on the charge sheet including the omission of the OB number. On the same breath, I also find that the issue of inconsistent evidence was incapable of occassioning any miscarriage of justice to the Appellant as the inconsistencies were not material at all.

36. The Appellant also alleged that his rights as an accused person were violated. He quoted Artice 49 of the Constitution claiming that he was arraigned in court after three days from the date of his arrest and no justification was given for the delay.

37. Article 49 provides for the rights of an accused person as folows:

"49. (1) An arrested person has the right:

(f) to be brought before a court as soon as reasonably possible, but not later than—

(i) twenty-four hours after being arrested; or

(ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day."

38. The rights of an accused person as enshrined in the Constitution are sacrosanct and must not only be respected but must be protected by all State organs. In this case, the right under Article 49 (1) (f) requires that an accused person is to be arraigned in court within 24 hours or on an ordinary court day if the time of arrest falls outside the court hours. I have looked at the date of arrest on the charge sheet, it is indicated as 29th April 2019 and the Appellant was arraigned before court on 2nd May 2019.

39. It was the submission of the Appellant that because he was arraigned before court after three days from the date of his arrest, the court ought to construe this violation of his rights in his favour and acquit him. The correct position on how a court of law should deal with an accused person in such a case was aptly enunciated in the Court of Appeal case of **Julius Kamau Mbugua vs. Republic [2010] eKLR**. In that case, the Court of Appeal considered section 72(3) of the old constitution and precedents from international law. It stated thus:-

".....the violation of the appellant's right to be produced in court within 24 hours would not automatically result in his acquittal. Instead, the appellant would be at liberty to seek remedy in damages for the violation of his Constitutional rights."

40. Comparative jurisprudence shows that violation of an accused's rights does not earn one an acquittal. In **Dyer vs. Watson [2004] 1 AC 379,** Lord Hutton pointed out the conflict in the case of **Darmalingum vs. State [2000] 5 LRC 522** on the question of unconstitutional delay and whether it should lead to conviction. He held at page 419 paragraph 121 that:-

"The judgments of the European Court, as I read them, suggest that where there has been unreasonable delay in breach of article 6 (1) the court does not taken the view that a conviction after such delay must automatically be quashed".

41. I am further pursuaded by the reasoning of Dulu J, in **Joshua Mumo Kioko vs. Republic (2012) eKLR**, where he held as follows:-

"The appellant complains that his Constitutional rights were contravened. That he was held in custody for 8 days before being brought to court. Article 49 (1) (f) of the Constitution (2010) provides that an arrested person should be brought to court within 24 hours. Though there has been earlier jurisprudence developed by courts that violation of this right leads automatically to an acquittal that jurisprudence has now changed. The remedy for such violations if proved, is a claim for damages. The Constitution (2010) adequately provides for such remedies. On my part, I will not hold that the conviction herein cannot stand because of that violation, even assuming that there was such violation of the provisions of Article 49 (1) (f) of the Constitution."

42. Finally, in **Ezekiel Oramat Sonkoyo vs. Republic Criminal Appeal No. 99 of 2012 [2012] eKLR**, the Court of Appeal at Kisumu while faced with a similar matter stated thus:-

"Applying the above principle to the instant case, I hold the considered view that the breach complained of by the appellant at this stage cannot be undone, and accordingly the appellant can only be compensated for that breach by way of damages. The appellant's block of grounds of appeal based on the issue of breach must therefore fail."

43. From the foregoing, it is not automatic that the Appellant herein is entitled to an acquital based on the unconstitutional delay to bring him before court. The above cited precedents settle this matter and the Appellant is entitled to seek remedies by way of damages through a Constitutional petition.

44. Having considerd all the grounds of appeal as argued above, I have come to the firm finding that the offence of attempted murder was adequately proven. I uphold the conviction by the trial court.

(ii) Whether the Sentence was Appropriate.

45. The Appellant was sentenced to serve 20 years imprisonment. The principles applicable in considering whether to interfere with the sentence of a trial court on appeal were enunciated in the case of **Mbogo & Another vs. Shah (1968) 1 E.A. 93** thus:-

"…a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."

46. The present offence attracted a mandatory sentence of life imprisonment. **Section 220 (b)** of the Penal Code provides as follows,

"Section 220

(b) .....is guilty of a felony and is liable to imprisonment for life."

47. In sentencing the Appellant, the trial magistrate stated as follows:-

"I have considered the nature of the charge and the accused's mitigation looking at the circumstances under which the offence was committed. There was no justifiable cause for the accused's action. The victim was maimed and is yet to recover from the injuries suffered. It is, looking at the medical documents, by grace that the victim survived the injuries. I also sympathize with the accused person who appears to be a young man in his 20's. This though cannot justify his actions. His action deserved to be punished and should not be condoned..."

48. It is clear therefore that the trial court considered the fact that the Appellant was a first offender, his mitigation that his parents depended on him as well as his current age. He also considered the circumstances of both the victim and the appellant and noted that the offence required a stiff punishment. In this regard, I am satisfied that due consideration was made in safeguarding the interests of the victim, the Appellant and the community at large.

49. In this appeal, the Appellant submitted that he was remorseful and prayed for forgiveness and leniency. He submitted that he was now orphaned and being the first born, his younger siblings depended on him.

50. I have taken into consideration the above plea and the fact that the Appellant spent one and a half years in pre-trial custody. **Section 333 (2) of the Criminal Procedure Code** which provides that:

"(2) Subject to the provisions of section 38 of the Penal Code every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody."

See also the Court of Appeal case of **Ahmed Abolfathi Mohamed & Another vs. Republic [2018] eKLR.**

51. In the end I uphold the conviction. The Appellant shall serve 18 years imprisonment and the Sentence shall run from 2nd May,2019 being the date of arrest and pre-trial custody.

JUDGMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 28TH DAY OF APRIL, 2022.

.....

R. LAGAT-KORIR

JUDGE

Judgment delivered in the presence of Ms. Boyon holding brief Mr. Muriithi for the State, Appellant present in person and Kiprotich (Court Assistant).